(2)

No. 03-1669

IN THE

Supreme Court of the United States

CITY OF SAN DIEGO, SAN DIEGO CITY POLICE DEPARTMENT, DAVID BEJARANO, GEORGE SALDAMANDO, GLENN BREITENSTEIN,

Petitioners,

v.

JOHN ROE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

MICHAEL P. BARANIC
Counsel of Record
GATTEY BARANIC LLP
2445 Fifth Avenue, Suite 350
San Diego, CA 92101-1665
(619) 232-8142

Attorneys for the Respondent

189174

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTION PRESENTED

Whether the Ninth Circuit correctly held that Plaintiff/ Respondent John Roe engaged in speech on a matter of public concern?

PARTIES TO THE PROCEEDINGS

Petitioners

Petitioners in this action are the City of San Diego, the San Diego Police Department, former Chief of Police David Bejarano, Assistant Chief George Saldamando, and Captain Glenn Breitenstein. Petitioners were the defendants in the district court and the respondents in the Ninth Circuit Court of Appeals.

Respondent

Respondent is "John Roe." Roe proceeded under a pseudonym pursuant to a district court order granting him permission to do so. Roe was the plaintiff in the district court and appellant in the Ninth Circuit Court of Appeals.

TABLE OF CONTENTS

	Page
Question Presented	i
Parties To The Proceedings	ii
Table Of Contents	iii
Table Of Cited Authorities	iv
Introduction	1
Statement of the Case	2
Reasons for Denying the Petition	8
I. The Ninth Circuit Correctly Held that Roe Engaged in Speech on a Matter of Public Concern	8
A. The Court is Not Limited to Considering the Two Tapes Purchased by City Petitioners but Must Consider and Infer That Roe Offered and Sold the Tapes to a Broader Audience	8
B. The Cases Cited by City Petitioners as "Similar" to the Instant Matter Do Not Support Their Position	10
C. Roe Engaged in Speech on a Matter of Public Concern	15
Conclusion	18

TABLE OF CITED AUTHORITIES

Cases *Page*

Allen v. Scribner, 812 F.2d 426 (9th Cir. 1987) 16

Berger v. Battaglia, 779 F.2d 992 (4th Cir. 1985) .. 12

Berkovitz v. United States, 486 U.S. 531 (1988) ..8, 9, 10

Conley v. Gibson, 355 U.S. 41 (1957) 8

Connick v. Myers, 461 U.S. 138 (1983) 8, 16

Gillette v. Delmore, 886 F.2d 1194 (9th Cir. 1989) ... 15-16

Lawrenz v. James, 852 F.Supp. 986 (M.D.Fla. 1994) ..... *passim*

Mt. Healthy City School Dist. Bd. of Educ. v. Doyle, 429 U.S. 274 (1977) 16

Pappas v. Guiliani, 118 F.Supp.2d 433 (S.D.N.Y. 2000) 10, 11, 12

Pickering v. Board of Education, 391 U.S. 563 (1968) 16

Pruitt v. Howard County Sheriff's Department, 96 Md.App. 60, 623 A.2d 696 (1993) ..... *passim*

Tindle v. Caudell, 56 F.3d 966 (8th Cir. 1995) .... *passim*

United States v. National Treasury Employees Union, 513 U.S. 454 (1995) 17

United States Constitution

First Amendment 1, 9, 11, 16

Statute

42 U.S.C. § 1983 7

Rule

Federal Rule of Civil Procedure12(b)(6) 7

INTRODUCTION

Plaintiff/Respondent John Roe[1] submits this Brief in Opposition in response to the Petition for Writ of Certiorari filed by the Defendants/Petitioners City of San Diego, the San Diego Police Department, David Bejarano, George Saldamando, and Glenn Breitenstein.[2]

Petitioners assert that the Court should review the decision in this matter because the United States Court of Appeals for the Ninth Circuit was incorrect when it reversed and remanded the matter, holding that Roe engaged in speech on a matter of public concern.

The First Amendment is not necessary to protect what is popular or appealing to the masses. The First Amendment is necessary to protect expression that is unpopular, unappealing to the masses and does not conform to the norm. Would a vast majority of the citizenry rush out to purchase the videotapes Roe offered on eBay? Probably not. Was there a substantial audience that did seek out and purchase the videotapes offered by Roe? We cannot tell from the record. We cannot tell from the record because the district court, apparently believing the size of the audience that actually sought out and purchased the videos offered by Roe to be irrelevant, imposed the harshest sanction available – dismissing Roe's complaint for failing to state a claim without affording Roe leave to amend.

---

1. "John Roe" is the fictitious name for a City of San Diego Police officer.

2. For convenience Petitioners City of San Diego, the San Diego Police Department, David Bejarano, George Saldamando, and Glenn Breitenstein may be referred to collectively as the "City Petitioners" in this brief.

Dismissal of Respondent John Roe's complaint by the district court was improper. The Ninth Circuit correctly held that Roe engaged in speech on a matter public concern and that his speech was protected. The Court should deny the Petition for Writ of Certiorari.

STATEMENT OF THE CASE

John Roe was a non-probationary police officer employed by City of San Diego and the San Diego Police Department for approximately 7½ years prior to his termination. Petition for a Writ of Certiorari Appendix ("App."), 2a. Roe was terminated for his off-duty production and sale of sexually explicit, non-obscene videotapes. App.2a. The videotapes depicted Roe alone, engaging in masturbation, and did not identify Roe as an employee of or as being affiliated with City of San Diego or the San Diego Police Department. App., 2a. The videotapes were geared towards a gay, male audience and sold through the "adults only" section of the eBay internet auction website ("eBay"). App., 2a. The San Diego Police Department's investigation of Roe's off-duty conduct did not reveal that any member of the public recognized Roe from his eBay seller's profile, auction item descriptions, auction item pictures or any of the items he sold through eBay. App., 4a. Likewise, the San Diego Police Department's investigation did not reveal that any member of the public ever complained about Roe's production or sale of the videotapes or sale of any of the items of clothing he offered through eBay.

None of the documents relied on by the City Petitioners allege that any of the videotapes produced by Roe were obscene in nature; that Roe's eBay activities affected his productivity, performance or ability to do his job as a police

officer; that Roe's off-duty conduct in any way interfered with the regular operation of the San Diego Police Department; or that Roe actually displayed, manufactured, distributed or sold any sexually explicit materials after being ordered to cease such conduct.

In July 2000, Roe's sergeant, Robert Dare, searched eBay and located a tan uniform formerly used by the San Diego Police Department for sale. App., 3a, 52a. The uniform was offered for sale by a seller utilizing the eBay username "Code3stud@aol.com."[3] App., 3a, 52a. Dare also located a uniform formerly used by the National City Police Department also offered for sale by Code3stud@aol.com. App., 52a. Dare searched for other items offered by Code3stud@aol.com and eBay indicated that Code3stud@aol.com had items offered for sale in the "adults only" section but did not reveal what those items actually were. App., 3a, 52a.

In order to access the "adults only" section of eBay, Dare was required to certify that he was at least 18 years of age and of the legal age to access sexually explicit materials in his community. In order to confirm that he was at least 18 years old, Dare was required to provide eBay with a valid credit card number, valid credit card expiration date, the correct name to which the credit card is issued and the correct billing address to which the credit card statements are sent. As part of the process to gain access to the "adults only" area, Dare was required to certify that he would not permit anyone under 18 years of age to have access to any of the

3. "Code 3" is a code utilized by many police agencies to indicate that an officer is responding to a situation using the emergency lights and siren of the officer's patrol vehicle.

materials contained in the "adults only" area; that he voluntarily chose to access the "adults only" area because he wanted to view, read and/or hear the various materials available in that section; that he had the legal right to possess sexually explicit materials in his community; that he does not find pornographic images of nude adults, adults engaged in sexual acts or other sexual materials to be offensive or objectionable; and that he would immediately exit the "adults only" area if he was in any way offended by the sexual nature of the materials he sought to access. Dare made the required certifications, gained access to the "adults only" area and viewed a number of listings for items offered for sale by Code3stud@aol.com. App., 3a. Dare had been Roe's supervisor since January 2000, and recognized pictures of Code3stud@aol.com contained in the listings for various auction items as being Roe. App., 3a.

Dare printed out a number of the items offered for sale by Code3stud@aol.com and shared the printouts with other supervisors in Roe's chain of command. App., 3a. The San Diego Police Department initiated an investigation into Roe's lawful, off-duty conduct of selling, among other things, certain articles of clothing and the personal homemade videotapes on eBay. App., 3a.

As part of its investigation, on July 21, 2000, the San Diego Police Department investigators first purchased a pair of white men's briefs and a pre-made personal videotape offered for sale by Code3stud@aol.com. App., 3a, 53a. On September 7, after an exchange of e-mail correspondence between department investigators and Code3stud@aol.com, department investigators ordered another videotape depicting Code3stud@aol.com again alone, engaging in masturbation, but this time custom made to the investigator's specifications/ storyline. App., 3a.

As part of their investigation, department investigators had each of the items they purchased reviewed by United States Postal Service inspectors to determine whether Roe engaged in any criminal conduct or any conduct in violation of Postal Service regulations. After viewing the materials and videotapes sold and transmitted through the mails, the Postal Service inspectors advised department investigators that neither the sale nor transmission of the materials and videotapes through the mail constituted any criminal conduct or any conduct in violation of Postal Service regulations on the part of Roe.

None of the items offered for sale by Roe identified Roe as an employee of or as being affiliated with the City of San Diego or the San Diego Police Department. App., 4a, 52a. All aspects of the videotapes, including the production, manufacturing, sale and shipment of the videotapes were conducted while Roe was off-duty, away from his employer's premises, without using any City of San Diego or San Diego Police Department time or equipment and at no expense to the City or Department. App., 3a, 4a, 52a, 53a.

Roe went to great lengths to ensure that he was not identified as an employee of or as being affiliated with City of San Diego or the San Diego Police Department, 52a, 53a. Roe never identified himself by his true name in any sale or listing on eBay. App., 4a, 53a. Roe never identified himself as a police officer with City of San Diego or the San Diego Police Department in conjunction with any sale or listing on eBay. App., 4a. In an attempt to conceal his identity as a San Diego Police Department officer, Roe described himself, in his eBay seller's profile, as living "in Northern California" and being "in the field of Law Enforcement" without naming any specific department.

App., 4a, 53a. All payments for items sold by Roe on eBay were made to a "S. Shatswell"[4], and not to Roe, utilizing a post office box address in the northern California town of Tracy, approximately 450 miles north of San Diego. App., 4a, 53a.

On October 17, 2000, Roe was interviewed by a department investigator regarding his involvement in the sale of videotapes and items of clothing on eBay. App., 4a, 53a. Roe was completely truthful during the interview, admitted to the off-duty conduct and answered all of the investigator's questions. App., 4a.

On December 20, 2000, San Diego Police Department Captain Breitenstein ordered Roe "to cease displaying, manufacturing, distributing or selling any sexually explicit materials or engaging in any similar behaviors, via the internet, U.S. Mail, commercial vendors or distributors, or any other medium available to the public." App., 4a, 53a. Although Roe believed Breitenstein's order to be an unlawful order, in order to avoid a charge of insubordination or disobedience to a lawful order, Roe removed all items he had listed for sale on eBay. App., 4a, 53a, 54a.

On March 29, 2001, Roe was served with an Advance Notice of Adverse Action – Termination, signed by Breitenstein, proposing termination of Roe's employment. The proposal was based on allegations that Roe violated Department Policy 9.04 – Obedience to Lawful Orders; (App., 5a) Policy 9.06 – Unbecoming Conduct; Policy 9.07 – Immoral Conduct; and Policy 5.12 – Outside Employment. App., 4a, 54a.

---

4. Not Roe's true name.

On April 27, 2001, Roe participated in a pre-disciplinary conference, presided over by Breitenstein, in order for Roe to respond to the proposal to terminate his employment. App., 5a, 54a.

On June 29, 2001, Roe was served with a Notice of Termination signed by San Diego Police Department, Chief of Police David Bejarano upholding the proposal to terminate Roe's employment based on the charges alleged in the March 29, 2001, Advance Notice of Adverse Action. App., 5a, 55a. On June 29, 2001, just prior to being served with the Notice of Termination, Dare served Roe with a performance evaluation covering the period of January 7, to April 27, 2001. App., 5a, 55a. The evaluation concluded that Roe met San Diego Police Department standards for his position as a police officer and noted that Roe had received a letter of commendation during the rating period. App., 5a, 55a. The evaluation noted no deficiencies in Roe's performance for the rating period. App., 55a. Roe's employment with the City was terminated effective June 29, 2001, at 9:00 a.m. App., 5a.

On September 28, 2001, Roe brought suit against the City of San Diego, City of San Diego Police Department, as well as Chief of Police David Bejarano, Assistant Chief of Police George Saldamando and Captain Glenn Breitenstein in their official and individual capacities. App., 5a, 51a. Roe's claims against the City Petitioners regarding the termination of his employment were brought under 42 U.S.C. § 1983. App., 5a.

The City Petitioners brought a motion to dismiss Roe's Complaint pursuant to F.R.C.P. 12(b)(6). App., 5a. After full briefing and oral argument, the district court issued its order

on December 21, 2001, granting the City Petitioners' motion to dismiss. App., 5a. In granting the City Petitioners' motion, the district court found that Roe had "not shown how the production, marketing and sale of sexually explicit videos for commercial profit is a matter of public concern for purposes of the *Connick* 'public concern' test. App., 65a. [Roe] was not expressing anything related to public affairs, commenting upon internal San Diego Police Department policies or procedures or even talking or litigating about work." App., 65a.

Roe filed his appeal to the Ninth Circuit Court of Appeals on January 18, 2002. App., 4a.

REASONS FOR DENYING THE PETITION

I. The Ninth Circuit correctly held that Roe Engaged in Speech on a matter of Public Concern

A. The Court is Not Limited to Considering the Two Tapes Purchased by City Petitioners but Must Consider and Infer That Roe Offered and Sold the Tapes to a Broader Audience

For purposes of review, the Court "must assume that petitioners' well-pleaded allegations are true." *Berkovitz v. United States*, 486 U.S. 531, 540, (1988). "A complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957).

In their Petition, City Petitioners latch on to the fact that, as pointed out by Roe in his Opening Brief to the Court of

Appeal, the District Court only had evidence before it that Roe sold two videotapes and sold the videotapes for a particular price. In his brief, Roe pointed out that the District Court had only that particular evidence before it to address the District Court's conclusion that the tapes were sold for "commercial profit". Roe noted that there was no evidence presented to establish whether a "profit" was made on the sales and pointed out that "the fact that materials may be published and sold for a profit does not prevent them from being a form of expression safeguarded by the First Amendment."

The City Petitioners assert that Roe "concedes" that the two videotapes were the only information before the District Court and conclude that the production and sale of the two videotapes, which were sold to the police department's investigator, form the entire basis of Roe's First Amendment claim. The City Petitioners then argue that the sale of the two videotapes was nothing more than a "private" sale between Roe and the San Diego Police Department investigator such that it did not implicate First Amendment concerns. Finally, the City Petitioners argue that Roe cannot establish that he "was engaged in the production and distribution of sexually explicit films."

The City Petitioners are incorrect in their conclusion that the entire basis of Roe's First Amendment claim is the sale of the two videotapes and that Roe cannot establish that he was engaged in the production and distribution of sexually explicit films. As noted above, for the purposes of review, the Court "must assume that petitioners' well-pleaded allegations are true." *Berkovitz v. United States*, 486 U.S. at 540. If this case turns on whether Roe sold only two tapes to the police department investigator or whether he produced,

offered, sold and distributed the sexually explicit films to a much larger audience of potential buyers who sought out the items on eBay, all reasonable inferences must be drawn in Roe's favor. *Id.* All reasonable inferences support the latter position that the videotapes were produced, offered, sold and distributed to interested buyers who sought out the items in addition to the two tapes sold to the police department investigator.

B. The Cases Cited by City Petitioners as "Similar" to the Instant Matter Do Not Support Their Position

In their Petition, City Petitioners try to compare Roe's conduct to that of a police officer sending unsolicited anti-Semitic and anti-black hate mail (*Pappas v. Guiliani*, 118 F.Supp.2d 433 (S.D.N.Y. 2000), a police officer wearing a racist Halloween costume to a party at a Fraternal Order of Police Lodge party (*Tindle v. Caudell*, 56 F.3d 966 (8th Cir. 1995), police officers' parody of Hogan's Heros involving Nazi salutes and clicking heels (*Pruitt v. Howard County Sheriff's Department*, 96 Md.App. 60, 623 A.2d 696 (1993); and a correctional officer wearing a white power T-shirt to a private barbeque (*Lawrenz v. James*, 852 F.Supp. 986 (M.D.Fla. 1994). Aside from the fact that only one of the cases cited is a federal circuit court decision, these cases are all easily distinguishable from the instant matter and do not support the City Petitioners' position.

City Petitioners assert that the district court in *Pappas v. Guiliani* addressed a case similar to the present. In *Pappas*, a police officer was terminated for sending *unsolicited* anti-Semitic and anti-black hate mail to various organizations from which he received solicitations seeking donations,

including another police department. When he would receive such solicitations, Pappas would fill the accompanying reply envelopes with anti-Semitic and anti-black hate mail and mail the envelopes back to those seeking donations. In analyzing whether Pappas engaged in speech on a matter of public concern or whether his speech was merely a personal grievance entitled to no First Amendment protection, the district court noted that courts have been particularly skeptical in cases where plaintiffs have sought to justify patently hateful and inflammatory speech in terms of "public concern." *Pappas* at 444, *citing Tindle v. Caudell*, 56 F.3d 966 (8th Cir. 1995) (police officer's off-duty donning of a "blackface" costume demeaning to blacks not an expression on a matter of public concern), *Lawrenz v. James*, 852 F.Supp. 986, 992 (M.D.Fla. 1994) (police officer's off-duty wearing of "white power" T-shirt is a matter private interest, not public concern); *Pruitt v. Howard County Sheriff's Dept.*, 96 Md. App. 60, 623 A.2d 696 (1996) (police officers' parody of Hogan's Heros involving Nazi salutes, clicking heels, and utterances in German was a matter of private amusement, not public concern). The three cases cited by the *Pappas* court for the position that courts are skeptical of plaintiffs who attempt to justify hate speech in terms of "public concern" are the same three cases relied on by City Petitioners and discussed below.

The *Pappas* court concluded that the "record makes evident that Mr. Pappas intended to convey no message of 'public concern' in his mailings to solicitors, he simply wanted to dissuade charities from soliciting money from him by offending them with racist mailings." *Pappas* at 445. The recipients targeted by Pappas did not seek out or request that the hate mail be sent to them. The recipients in the instant case, on the other hand, were all interested in, sought out

and voluntarily purchased the videos offered by Roe. A reasonable inference regarding the allegations of Roe's Complaint is that people, other than the police department investigator, purchased the videos, that the videos were purchased as entertainment and that no member of the public complained to the police department regarding Roe's conduct. The *Pappas* case is *not* similar to ours and does not support the City Petitioners' position.

The City Petitioners also try to compare Roe's conduct to that of the plaintiff in *Tindle v. Caudell*. Tindle was terminated for wearing a racist Halloween costume in which he dressed in bib overalls, painted his face black, donned a black curly wig and carried a watermelon to a costume party at the local Fraternal Order of Police Lodge. The party was attended by a number of other off-duty members of the police department, including several African-American officers. *Tindle*, 56 F.3d at 968. Tindle argued that he wore the costume to "entertain" the other party guests. In dismissing Tindle's claim that his costume was akin to that of the police officer in *Berger v. Battaglia*, 779 F.2d 992 (4th Cir. 1985), the court noted that "artistic expression before a public audience is quite different from a decision to wear a costume to a private Halloween party." *Tindle* at 970. The court also found it important that although the costume party occurred off-duty it was at the Fraternal Order of Police Lodge, was attended by members of the police department, was a function related to work and actually culminated in complaints from African-American officers of the department who were present and witnessed the conduct. *Id.* None of those factors are present in the instant case. As discussed in his complaint, Roe did not identify himself as a San Diego Police Department officer or City employee in any sales and went to great lengths to ensure that his conduct was not connected with the City or

Department. Unlike the complainants in *Tindle* who were involuntarily subjected to Tindle's racist costume by their mere attendance at the same party, the recipients in the instant matter voluntarily sought out and purchased the videos offered by Roe, and did so only after making the requisite certifications that they were not offended by such materials.

In their discussion of *Tindle*, City Petitioners state that the *Tindle* court likened their case to that faced by the Maryland Court of Special Appeals in *Pruitt v. Howard County Sheriff's Department*, 96 Md.App. 60, 623 A.2d 696 (1993), and try to equate the "private" activity engaged in by Tindle and the Pruitts with that of Roe. In *Pruitt*, Major Donald Pruitt and Sergeant Dennis Pruitt engaged in "Nazi-like" comments and behavior *while in uniform and in the presence of fellow officers and court personnel*. The conduct ranged from parodies of "Hogan's Heroes," including imitations of "Colonel Klink" and "Sergeant Schultz," exaggerated German accents, exaggerated military mannerisms such as the German Hitler hand salute and heel clicks, to the use of terms like "*achtung*" and "*sieg heil*." *Pruitt* at 65, n1. (emphasis added). The court found that:

> [u]pon review of the Pruitts' actions in light of their content, form, and context, we are compelled to conclude that such conduct is not speech on a matter of public concern. The Pruitts testified at the administrative hearing that their conduct was humorous in nature and intended as a joke – as a parody of Hogan's Heroes. Appellants' speech did not, by their own admission, contain any allegations of wrongdoing or present issues of public concern to the community.

Pruitt at 70.

Roe does not dispute the fact that a government employer has a great deal of discretion to regulate the speech of its employees when they speak as employees or when the speech takes place at the worksite. That is what the court was faced with in *Pruitt*. That is not the issue facing this Court. This Court is faced with the issue of speech by a public employee, that occurs off-duty, away from the employer's premises and which cannot be attributed to the employer.

Since the *Pruitt* court found that the officers' "conduct occurred in a private setting – generally away from the public view" (*Pruitt* at 701-02) and concluded that the speech in that case was "private", the City Petitioners try to squeeze the instant matter into that "private setting" language asserting the Roe engaged in a "very private activity" which was "for [his] own amusement". The "setting" at issue is where the *speech* occurred. In *Tindle* and *Pruitt* the speech occurred in areas that were generally out of the public view and only open to members of the department. In Roe's case, the "setting" where the speech occurred was on eBay, in a section open to interested members of the public who were of legal age to receive the materials. Although the videos may have been recorded in "private" the speech for which Roe was terminated was his speech in a public setting – eBay. Roe was not terminated for videotaping himself engaging in sexual activity. Roe was terminated for offering for sale and distributing those videotapes. Neither *Tindle* nor *Pruitt* support the City Petitioners' regulation of Roe's speech nor Roe's termination.

Finally, City Petitioners compare Roe's conduct to that of a corrections officer in *Lawrenz v. James*, 852 F.Supp. 986 (M.D.Fla. 1994). Lawrenz was a probationary corrections officer who, on January 18, 1993 (Martin Luther King's Day),

attended a private barbeque wearing a "White Power" T-Shirt. The barbeque was held at the home of a corrections officer and was attended by a number of other corrections officers. After becoming intoxicated, one of the officers fired an AK-47 rifle into the air. The police responded, the officer who shot into the air was arrested and the incident was covered by the media. Lawrenz was terminated and subsequently sued the department. During the course of the proceedings, Lawrenz conceded that his wearing the T-Shirt was "at least initially a matter of purely private concern" but became elevated to the level of constitutional importance because he and his co-workers discussed workplace race relations at the private barbeque. *Lawrenz* at 991. Noting that Lawrenz' "speech" occurred at a private party, which was attended by members of his department, the court found that "mere employee grievances, even when based on perceived unconstitutional discrimination or even where the grievance extends to the similar plight of coworkers, are not matters of public concern." *Lawrenz* at 992. Unlike the speech in *Lawrenz* which was found to be merely an employee grievance directed at the officer's co-workers, Roe's speech was directed at a segment of the public that sought out the videos he offered and was interested in receiving his message and was not merely a personal or employment related grievance.

C. Roe Engaged in Speech on a Matter of Public Concern

In analyzing speech by a government employee, made *as* a government employee, this Court follows a three-step approach when it reviews the termination of an employee that allegedly violates the free speech clause of the First Amendment. *Gillette v. Delmore*, 886 F.2d 1194, 1197

(9th Cir. 1989), *citing Mt. Healthy City School Dist. Bd. of Educ. v. Doyle,* 429 U.S. 274, 287 (1977). This Court must determine: 1) whether the employee's speech is entitled to constitutional protection, *see Pickering v. Board of Education,* 391 U.S. 563, 569-72 (1968); 2) whether, if protected, the speech was a substantial or a motivating factor in the action taken against the employee, *see Mt. Healthy,* 429 U.S. at 285-87; and 3) whether the government employer demonstrated that the same action would have been taken in the absence of the protected activity, *see Allen v. Scribner,* 812 F.2d 426, 433-36 (9th Cir. 1987), *amended*, 828 F.2d 1445 (9th Cir. 1987). The first element and ultimate issue – whether the speech is protected – is a question of law for the Court to decide. *Connick v. Myers*, 461 U.S. 138, 148, n. 7 (1983).

This first element, whether a government employee's speech addresses a matter of public concern, depends upon "the content, form, and context of [the speech] as revealed by the whole record." *Connick* at 147-48. City Petitioners apparently concede "that the production and/or distribution of sexually explicit films [i.e. movies] [is] protected under the First Amendment" but, without explaining why, conclude that such protection is "irrelevant" to this case. The fact that production and distribution of sexually explicit films is protected under the First Amendment is completely relevant to this case because it establishes that the "content" and "form" of speech engaged in by Roe is protected. The final factor the Court must consider is the "context" in which the speech is made. That is where the cases cited by City Petitioners are helpful. In *Tindle*, *Pruitt* and *Lawrenz*, all the speech at issue occurred either at work or at a work related function. Those government employers were within their rights to regulate their employee's speech because the speech

occurred either at work or was directed at the employee's co-workers. The "context" in this case clearly shows that the speech was not made at work nor to Roe's co-workers so as to have some impact on the San Diego Police Department but was made to a segment of the public that was interested in the videos being offered, actively sought out such materials, certified that they were not offended by such materials and only purchased the videos if they were interested in doing so.

Like the employees in *United States v. National Treasury Employees Union*, 513 U.S. 454 (1995), Roe's speech and expressive activities "were addressed to a public audience, were made outside the workplace, and involved content largely unrelated to [his] government employer" therefore falling "within the protected category of citizen comment on matters of public concern rather than employee comment on matters related to personal status in the workplace." *Id.* at 466.

The content, form and context in which Roe produced, offered and sold the videos establishes that he engaged in speech on a matter of public concern.

CONCLUSION

For the reasons set forth above, Plaintiff/Respondent John Roe respectfully requests that the Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

MICHAEL P. BARANIC
Counsel of Record
GATTEY BARANIC LLP
2445 Fifth Avenue, Suite 350
San Diego, CA 92101-1665
(619) 232-8142

Attorneys for the Respondent